EXCERPT FROM FATHER'S BRIEF ON MERITS BEFORE THE SUPREME COURT OF THE STATE OF OREGON (PAGES 38-41). THE FIFTY-STATE SURVEY

The pre -*Troxel* fifty-state survey of nonparent custodial standards has been updated through July of 2003. The custodial standards may still be grouped into the above three broad categories.

(a) The strict parental fitness test

Six states apply a strict fitness test, requiring a nonbiological parent to prove a natural parent unfit.[49] Eight states require a showing of unfitness or exceptional circumstances.[50] Six states require a showing of unfitness or

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49 Kansas — K.S.A. section 60-1610 (a) (5) (C) (pertaining to types of temporary residency arrangements with nonparents if neither parent found to be fit); Nebraska — *Combs v. O'Neal*, 662 NW 2nd 231 (2003); West Virginia — *In Re Jade E.G.*, 575 SE 2nd 325 (W. Va. 2002) (parent has natural right to custody unless parent is unfit); for Iowa, Oklahama and Wisconsin, see *supra* 36 Will. L. Rev. at 604 n. 201 (App 16)

50 New Hampshire — *In Re Nelson*, 825 A2d 501, 503 (N.H. 2003) (*Troxel* presumption governs custodial adjudications, and may be rebutted "[o]nly in the most unusual and serious of cases" by a showing of unfitness, abuse or neglect); Maryland — *Shurupoff v. Vockroth*, 814 A. 2d 543 (MD 2003) (rejecting clear and convincing evidence standard for rebutting parental presumption); South Dakota — S.D. codified laws, section 25-5-29, 25-5-30, 29 A-5-106 (2003); *Meldrum v. Novotny*, 640 NW 2d 640 (S.D. 2000) (third party required to establish by clear and satisfactory proof that parent is unfit); Tennessee — *Ray v. Ray*, 83 SW 3d 726 (Tenn. App. 2001) (finding that parent is unfit must be supported by clear and convincing evidence; third party must demonstrate child will be exposed to substantial harm if custody awarded to parent; *In Re Madelaine Sierra Redmond*, 2002 Tenn. Appl, LEXIS, 528 (Tenn. Ct. App. 2002) (severe emotional harm); Vermont — *Paquette v. Paquette*,

detriment to the child.[51] Six states seem to utilize a two-pronged test, employing strict fitness together with a best interest standard.[52]

All together, twenty-six state jurisdictions apply a strict parental fitness custodial standard or a variation, with most requiring a high-threshold showing of unfitness or extraordinary circumstances, gross misconduct, or conduct detrimental to the child.

(b) The intermediate or parental presumption-best interest

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499 A. 2d 23 (Vermont 1985); Minnessota — *In Re Custody of N.A.K.*, 649 NW 2d 116 (Minn. 2002) (parental presumption must be overcome by "extraordinary circumstances of a grave and weighty nature"). For Nevada, New Mexico and *Vermont* see, also, *supra*, 36 Will. L. Rev supra at 604-605 n. 202. (App 16-17)

51 Alaska — *Todd v. Todd*, 989 P 2d 141, 143 (Alaska 1999) ("parental custody is preferable" but will be "refused when clearly detrimental to the child."); Colorado — Colo. rev. stat. Section 14-10-123 (1) (b) (c) (West 2003); People ex rel A.M.K., 68 P 3d 563 (Colo. App 2003) (presumption is that child's best interest are served by custody with fit biological father); Oregon — ORS 109.119 (2001); *O'Donnell-Lamont v. Lamont*, 184 Or App 249 (2002), affirm. On recons. 187 Or App. 14 (2003), rev. allowed (2003) (*Troxel* presumption rebutted by showing either parent unable to adequately care for chid or will cause child undue harm).
Washington — RCW, section 26.10.030 (West 2003); *In re Custody of Anderson*, 890 P 2d 525, 523 (Washington Ct. App. 1995), rev. den. 898 P 2d 308 (1995); For Florida, New York and Washington see, also, 36 *supra* Will. L. Rev. at 605 n. 203 (App 17)

52 Alabama — N.L.R. v. C.A.D. 2003 Ala Civ. App., LEXIS 304 (Ala. Civ. App. 2003) (parental presumption only overcome by competent evidence that parent is unfit or unsuited for custody); For Arkansas, Hawaii, Massachusetts, Mississippi, and New Jersey, see, 36 Will. L. Rev. at 605 n 204 Id. (App 17-18).

standard.

Six states and the District of Columbia apply a rebuttal presumption that custody to the natural parent is in the child's best interest, which may be rebutted by clear and convincing evidence.[53] Five states require a showing that custody to the natural parent would be detrimental to the child, or would substantially harm the child, and that an award to the third party is required to serve the child's best interest.[54] Six states now employ a presumption that the natural parent has a superior or paramount status that may be forfeited, the court then applying

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53 Arizona — A.R.S., section 25-415 (nonparent must establish intervenor standing by, inter alia, establishing in *loco parentis* standing with the child and that custody with parent would be "significantly detrimental" to the child; *Troxel* presumption is rebutted by showing "by clear and convincing evidence that awarding custody to a legal parent is not in the child's best interest.") California — Cal. Fam. Code, section 3041 (West 2003); Georgia — *Clark v. Wade*, 544 SE 2d 99, 107 (Ga. 2001) (parental presumption rebutted by third party showing that parental custody would physically or emotionally harm the child; showing must be made by clear and convincing evidence); Indiana — Ind. Code, sec. 31-9-2-35.5 (defining "de facto custodians"); *In Re Guardianship of L.L.*, 745 NE 2d 222 (Ind. App. 2002); *In Re Guardianship of B.H.*, 770 NE 2d 283 (Ind. 2002). Michigan — Mich. Comp. Laws, section 722.25, Sec. 5.1; *Greer v. Alexander*, 639 NW 2d 39 (Mich. App. 2001); *Heltzel v. Heltzel*, 638 NW 2d 123 (Mich. App 2001); Virginia — Va. Code Ann. Sec. 20-124.2B (third person must have a "legitimate interest); District of Columbia — appeal of H.R. 581 A 2d 1141, 1144 (D.C. 1990); *In Re Minor Child T.C.*, 2002 W.L. 32113968 (Unpublished); see *supra* 36 Will. L. Rev. at 606 n. 206 (App 18-19)

54 For Connecticut (detrimental), Louisiana (substantial harm), Missouri (unfit, unsuitable or unable to be custodian; special and extraordinary reasons), Ohio (detriment or harmful effect) and Texas (child will be significantly impaired whether physically or emotionally). See, also 36 Will. L. Rev. *supra* at 607 n. 207. (App 19)

the best interest test.[55]

Seventeen states now employ the intermediate parental presumption standard. At least thirty states (26 states plus Louisiana, Missouri, Pennsylvania, Texas) require either a showing of unfitness or a relatively high threshold of harm (substantial harm).

(c) The Strict Best Interest Standard.

Prior to the Supreme Court's *Troxel* decision, approximately eleven states employed a strict best interest standard in custodial disputes between natural parents and third persons.[56] Post-*Troxel*, only seven states now employ a pure best interest custodial standard.[57] It is expected that in view of

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55 North Carolina — *Adams v. Tessener*, 550 SE 2d 499 (N.C. 2001) (father's conduct found to be inconsistent with this protected interest in child); *Owenby v. Young*, 597 SE 2d 264 (N.C. 2003) (maternal grandmother failed to establish by clear and convincing evidence that father forfeited his constitutionally protected parental status). Three states still require a showing that a "psychological parent" status exists. North Dakota — *Cox v. Cox*, 613 NW 2d 516 (N.D. 2000) (court found lack of "exceptional circumstances" to award custody of child to third-party couple as the wife had desired); Pennsylvania — *Douglas v. Wright*, 801 A2d 586 (Pa. Super. Ct. 2002) (See, 36 Will. L. Rev. *supra* at 608 n. 209). For Illinois and South Carolina, see supra 36 Will. L. Rev. 607 n 208; For Montana, North Dakota (serious hard or detriment) and Pennsylvania, see also supra at 608 n 209. (App 20)

56 See, *supra*, 36 Will. L. Rev. supra 609 n. 213

57 Idaho — Idaho Code, Sec. 32.717(3); Kentucky — Ky. Rev. Stat. Ann. Sec. 620.027 (West 2003) (best interest test utilizes where child residing with grandparent in a stable relationship); *Sullivan v. Tucker*, 29 SW 3d 805 (Ky 2000); *Consalvi v. Cawood*, 63 SW 3d 195 (Ky. App. 2002) (third party not found to be *de facto* custodian even though he was primary caregiver and financial supporter under the statute, KRS 405.020); For Delaware, Idaho, Kentucky, Maine, Rhode Island, Utah

the *Troxel* holding, each of the remaining seven holdout states will either statutorily or judicially engraft the *Troxel* parental presumption into the nonparent custodial standard.

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and Wyoming see, *supra*, 36 Will. L. Rev. supra 609 n. 23. (App 20-21)